



Decision

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Matter of: Creative Custom Products

File: B-417761

Date: October 18, 2019

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DIGEST

1. Protest challenging the evaluation of protester’s proposal as technically unacceptable is denied where the protester’s equal product, submitted in response to a brand name or equal solicitation for aircraft maintenance stands, failed to meet specific salient characteristics listed in the solicitation.
 2. Protest alleging that awardee’s brand name product does not meet salient characteristics in a brand name or equal solicitation is dismissed as untimely. Any alleged inconsistency between a brand name product and the salient characteristics used to define an “or equal” product must be protested prior to the due date for receipt of proposals.
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DECISION

Creative Custom Products (Creative), a small business located in Phoenix, Arizona, protests the award of an indefinite-delivery, indefinite-quantity contract to FlexDecks, Inc., a small business located in Houston, Texas, under request for proposals (RFP) No. N68335-19-R-0011, issued by the Department of the Navy, Naval Air Warfare Center, for V-22 Osprey aircraft maintenance wing stand platforms (maintenance stands). The protester challenges the agency’s evaluation of its proposal as technically unacceptable for failing to meet salient characteristics established by the solicitation. Alternatively, the protester alleges that the awardee’s proposal failed to meet the same salient characteristics, rendering the awardee’s proposal unacceptable as well.

We deny the protest in part and dismiss it in part.

BACKGROUND

The Navy issued the RFP on October 17, 2018, as a small business set-aside under the commercial acquisition procedures of Federal Acquisition Regulation (FAR) subpart 12.6, and provided for the award of a fixed-price indefinite-delivery, indefinite-quantity contract for a base year and four 1-year option periods. As amended, the solicitation sought proposals for the manufacture and installation of the maintenance stands¹ on a brand name or equal basis and identified the maintenance stand manufactured by FlexDecks, Part Number 10307101, Rev. B,² as the brand name product. The solicitation included a detailed set of salient characteristics that had to be satisfied by any product offered as equal to the brand name. RFP at 4-9. The RFP incorporated, by reference, FAR clause 52.211-6, brand name or equal, which informs offerors that, to be considered for award, proposals offering equal products had to include sufficient information to show that the offered products meet the salient characteristics listed in the solicitation. Id. at 24.

The solicitation described the required maintenance stand as comprised of six interlocking sections, three of which allow maintenance support for the left wing of the aircraft, and three which allow maintenance support for the right wing of the aircraft. Id. at 4. The solicitation identified three sections of the platform assembly as Deck A, Deck B, and Deck C. Deck A was the forward inboard section of the platform assembly; Deck B was the aft inboard section of the platform assembly; and Deck C was the outboard section of the platform assembly. Id. at 4-5.

In pertinent part, the salient characteristics for Deck A were as follows:

- It shall connect to Deck C on the outboard edge and Deck B on the aft edge.
- The aft edge shall have an area (approximately 30 by 36 inches) of telescoping decking comprised of six (6) extruded aluminum sliders, that can be extended or retracted as needed for maintainer access on the nacelle. This area is located to allow access to the Jacking Point on the wing.

¹ The maintenance stand accesses all necessary areas of the aircraft and provides fall protection and a safe working area for maintenance crews while they perform maintenance, repair, and overall of the V-22 Osprey aircraft. Agency Report (AR) exh. D, Decl. of Technical Evaluator at 1; Joint Contracting Officer's Statement and Memorandum of Law at 2.

² FlexDecks was formerly known as Flexible Lifeline Systems. Joint Contracting Officer's Statement and Memorandum of Law at 2.

Id. at 4.

As also relevant, the requirements for telescoping decking, were stated as follows:

- Required on the main flooring of Deck A as described above.
- The telescoping decking shall be made of multiple pieces of extruded aluminum that can be extended or retracted individually or together as needed for maintainer access to the nacelle. The sliders shall be designed such that each slider can be partially extended to varying lengths and securely held in place. Each slider shall also have a mechanical stop to prevent overextension.

Id. at 8.

The RFP provided for award on a lowest-priced, technically acceptable basis and established the following evaluation factors: price, technical acceptability, and delivery. Id. at 55-56. The solicitation stated that technical proposals would be evaluated on an acceptable/unacceptable basis and defined an unacceptable proposal as one that does not clearly demonstrate that the offeror's product meets the minimum system requirements. A proposal that received an unacceptable technical rating would result in the entire proposal being found unacceptable and eliminated from the competition.³ Id. at 56.

Regarding the evaluation of technical acceptability, the RFP stated that the specific areas to be evaluated were "listed in the evaluation matrix" included in the solicitation. Id. at 55. To this end, the evaluation matrix listed the salient characteristics and enumerated the technical requirements necessary to satisfy each one. Id. at 57-67. The evaluation matrix described the requirements for the salient characteristics at issue here, in pertinent part, as follows:

Deck A: forward inboard section of the maintenance platform assembly	
SC⁴ No.	Requirements
13	It shall connect to Deck C on the outboard edge and Deck B on the aft edge.
14	The aft edge shall have an area – approximately 30 inches long along the aft edge by 36 inches long along the outboard edge – of telescoping decking, comprised of six (6) extruded aluminum sliders, that can be extended or retracted fore and aft as needed for maintainer access on the nacelle. This

³ The RFP advised that the agency intended to make award without discussions on the basis of initial proposals received but reserved the right to conduct discussions if determined to be necessary. RFP at 53.

⁴ The abbreviation SC stands for salient characteristic.

	area is located to allow access to the Jacking Point on the wing.
Telescoping Decking	
88	Required on the main flooring of Deck A as described above. ⁵
90	The telescoping decking shall be made of multiple pieces of extruded aluminum that can be extended or retracted individually or together as needed for maintainer access to the nacelle. The sliders shall be designed such that each slider can be partially extended to varying lengths and securely held in place. Each slider shall also have a mechanical stop to prevent overextension.

Id. at 58, 64 (emphasis added).

The Navy received proposals from three offerors, including FlexDecks and Creative, by the solicitation’s November 30 due date.⁶ FlexDecks offered the brand name product at an evaluated price of \$17,352,897, while Creative offered an equal product at an evaluated price of \$[DELETED]. AR exh. G, Source Selection Decision Memorandum at 1.

In evaluating Creative’s proposed equal product, the agency found it technically unacceptable based on its failure to comply with two of the salient characteristics listed in the evaluation matrix, Nos. 14 and 88. For both salient characteristics, the agency assigned a deficiency because Deck A of Creative’s offered product included telescoping sliders that extended and retracted in a manner contrary to the salient characteristics – i.e., in the agency’s terms, Creative’s sliders extended and retracted “inboard and outboard,” rather than “fore and aft.” Id. exh. U, Technical Evaluation Report at 3; exh. D, Decl. of Technical Evaluator at 4-5. That is, the sliders extended and retracted towards the hull of the aircraft, rather than in the direction of the nose or tail of the aircraft. In addition, the agency found that the telescoping decking was inset into Deck A and offset from the aft and outboard edges, rather than extending to the aft and outboard edges.

Due to these deficiencies, the agency rated Creative’s proposal as technically unacceptable overall and eliminated its proposal from the competition. The agency evaluated FlexDeck’s proposal of the brand name product as technically acceptable and selected its proposal for award. Id. exh. G, Source Selection Decision Memorandum at 1-2. After providing Creative with notice of award on June 21, and a debriefing that concluded on July 9, this protest followed.

⁵ The agency explains that salient characteristic No. 88 specifically concerns telescoping decking. Because the telescoping decking for Deck A is described in salient characteristic No. 14, the phrase “as described above” is in reference to salient characteristic No. 14.

⁶ The third offeror’s proposal was rejected as technically unacceptable and is not at issue here.

DISCUSSION

Creative primarily protests the Navy's evaluation of its proposal as technically unacceptable. The protester argues that the agency applied unstated evaluation criteria in its evaluation of salient characteristics 14 and 88 when it identified a deficiency because (1) Deck A of its offered product included telescoping sliders that extended and retracted inboard and outboard, rather than fore and aft; and (2) Creative's offered product included a fixed edge on the aft outboard corner of Deck A with the telescoping sliders inset into Deck A, rather than having the telescoping sliders extending to the aft and outboard edges of Deck A. In the alternative, the protester asserts that the awardee's proposal should have been found unacceptable because its offered product also failed to meet the solicitation's salient characteristics.⁷

Unstated Evaluation Criteria

Regarding the first deficiency, Creative acknowledges that the evaluation matrix used the phrase "fore and aft" in its description of the salient characteristics for Deck A. The protester, however, maintains that the solicitation was silent as to the meaning of the phrase "fore and aft" and that the agency's interpretation is based on the unstated assumption that the terms "fore and aft" were relative to the nose and tail of the aircraft. According to the protester, the solicitation simply defined the phrase "fore and aft" in terms of the functional purpose of the telescopic sliders; that is, to provide maintenance crew with access to the nacelle and the jacking point on the wing. Protest at 31; Protester's Comments at 4. The protester maintains that it "had the discretion to choose the direction in which the sliders would extend/retract" see, Protester's Comments at 4, because the solicitation did not specify any dimensions for the individual telescoping sliders which, the protester alleges, would have established the direction in which they would extend/retract, fore and aft. Protest at 2.

The agency responds that it evaluated proposals consistent with the terms of the solicitation. The Navy states that the terms "fore" and "aft" are common aviation terminology used to describe the front and rear of an aircraft. The Navy also states that the solicitation defined the salient characteristics by using the directional terminology fore and aft, as well as the directional terminology inboard and outboard, in reference to location, direction, and placement of the telescoping sliders and decking, and their relation to each interlocking deck. Thus, contrary to the protester's assertion, the fore and aft requirement in salient characteristic No. 14 did not require firms to know the aircraft position. For example, the agency points out that the solicitation described each deck's position relative to the other decks, and that:

⁷ The protester raises numerous arguments in support of its protest. Although we do not specifically address each one, we have considered them all and conclude, based on the record before us, that none provides a basis to sustain the protest.

in the Evaluation Criteria, Deck A is described as the “forward inboard section of the Maintenance Platform Assembly” and as connecting “to Deck C on the outboard edge and Deck B on the aft edge.” Using the stand and deck configuration as a reference, “fore and aft” means toward and away from the aft edge of Deck A, or toward and away from Deck B.

AR exh. D, Decl. of Technical Evaluator at 2.

The agency further responds that Creative’s own proposal demonstrates that it understood the directional requirements of the solicitation. The protester’s proposal included drawings of its offered maintenance stand depicting all six parts of the maintenance stand--three decks on each side of the aircraft--were all correctly positioned relative to the aircraft. See Id. exh. F, Creative’s Proposal, Vol. 11, Section A (B) at 12-13, 15, 17-25, and 27.⁸ The agency also points out that in several areas of its proposal, the protester used the correct terminology and “also provided numerous descriptions throughout the proposal that include the terms “FWD,” “AFT,” “inboard” and “outboard” used correctly in the context of the requirements.” Id. exh. D, Decl. of Technical Evaluator at 3; Joint Contracting Officer’s Statement and Memorandum of Law at 11-12.

In reviewing a protest challenging an agency’s evaluation of proposals, our Office will not reevaluate proposals nor substitute our judgment for that of the agency, as the evaluation of proposals is generally a matter within the agency’s discretion. Ricoh America’s Corp., B-402239, Feb. 22, 2010, 2010 CPD ¶ 55 at 3. Further, in the case of a brand name or equal solicitation such as the one here, the particular features of the brand name product set forth in the solicitation as salient characteristics are presumed to be material and essential to the government’s needs. With respect to a firm offering an equal product that fails to demonstrate compliance with the stated salient characteristics its product is properly rejected as technically unacceptable. Sourceling, LLC--Protest & Costs, B-405907.2 et al., Jan. 27, 2012, 2012 CPD ¶ 58 at 4; OnSite Sterilization, LLC, B-405395, Oct. 25, 2011, 2011 CPD ¶ 228 at 3. Importantly, a contracting agency has a reasonable degree of discretion in determining whether a particular product has met the solicitation’s technical requirements, including those set forth as salient characteristics, and we will not disturb an agency’s decision unless it is shown to be unreasonable. Beckman Coulter, Inc., B-405452, Nov. 4, 2011, 2011 CPD ¶ 231 at 5; CAMSS Shelters, B-309784, B-309784.2, Oct. 19, 2007, 2007 CPD ¶ 199 at 6; Solid Waste Integrated Sys. Corp., B-258544, Jan. 17, 1995, 95-1 CPD ¶ 23 at 4.

Here, the record reflects that the agency did not apply an unstated evaluation criterion when it identified a deficiency in Creative’s proposal because the telescoping sliders proposed by the protester for Deck A extended and retracted inboard and outboard, rather than fore and aft. First, we reject the protester’s suggestion that the terms fore

⁸ Our Office added consecutive numbers to the pages of this document.

and aft could have meant anything other than the nose and tail of the aircraft. The common dictionary definition of the term “fore” is “situated or placed in front,” “the front part of something, especially a ship” and the term aft is defined as “at, near, or towards the stern of a ship or tail of an aircraft.”⁹ Thus, as the agency argues, the plain language of the solicitation established that the telescoping decking requirements for Deck A required them to retract and extend in the directions of the nose (front) and the tail of the aircraft.

Second, contrary to Creative’s contentions, the record shows that the RFP described the overall assembly for the maintenance stand, the components for Decks A, B, and C, relative to each other’s position in the overall assembly and the aircraft. See RFP at 4. In other words, it is apparent from the record that the correct placement and directional requirement in salient characteristic No. 14, fore and aft, could be properly understood relative to the configuration of the stand assembly and the aircraft itself. For example, the solicitation stated that Deck A, the forward inboard edge of the platform assembly, shall connect to Deck C on the outboard edge, and to Deck B on the aft inboard edge of the platform assembly. For Deck B, the aft inboard edge, the solicitation stated that it shall connect to Deck C on the outboard edge and to Deck A on the forward inboard edge. Third, the record shows that the protester, in fact, understood the directional terminology fore and aft as being relative to the aircraft since its proposed maintenance stand met the deck placement requirements relative to the stand assembly and the aircraft itself. Accordingly, Creative’s argument that the Navy applied an unstated evaluation criterion does not provide a basis to sustain the protest.¹⁰

Next, regarding the second deficiency, Creative similarly argues that the agency misevaluated its proposal when it assigned a deficiency based on Creative’s failure to offer a product with telescoping sliders along the aft and outboard edges of Deck A. Protester’s Comments at 18-28. As noted above, salient characteristic No. 14 stated that “the aft edge shall have an area – approximately 30 inches long along the aft edge by 36 inches long along the outboard edge – of telescoping decking, comprised of six

⁹ Oxford English Dictionary, <https://en.oxforddictionaries.com> (last visited October 10, 2019).

¹⁰ Alternatively, Creative argues that directional requirement specified in salient characteristic No. 14 was a minor and immaterial defect in its proposal that could be waived by the agency. Protest at 32. The agency responds that the fore and aft movement of the telescoping sliders for Deck A is not a minor or immaterial requirement; rather, the directional requirement is a matter of safety as well as function. Joint Contracting Officer’s Statement and Memorandum of Law at 13-14; AR exh. D, Decl. of Technical Evaluator at 4. Creative disagrees with the agency’s reasons why the directional requirement was neither minor nor immaterial, and presents a point by point rebuttal thereto. See Protester’s Comments at 11-18. However, the protester’s disagreement with the agency’s judgment here does not demonstrate that the agency’s conclusion was unreasonable. Beckman Coulter, Inc., supra at 6.

(6) extruded aluminum sliders,” RFP at 58. The record shows that the protester’s offered product replaced the aft and outboard edges of Deck A with telescoping sliders inset into Deck A. Stated differently, Creative’s proposed maintenance stand had a fixed edge on the aft and outboard corners of Deck A, with the telescoping decking inset within this fixed edge. Thus, the telescoping decking could only extend and retract within the bounds of the fixed edge. See, e.g., AR exh. D, Decl. of Technical Evaluator, encl. 2, Protester’s Depiction of Deck A Telescoping Sliders.

The agency identified this aspect of the protester’s proposal as a deficiency because with the telescoping sliders “extending/retracting as proposed by [Creative], the wing jack would have to be removed before Deck A could be moved more than a few feet.” Id. at 5. In other words, the agency was concerned that the protester’s design “forces a significant increase to maintenance man-hours for removing and re-installing the wing jack, and also potentially for other maintenance actions.” Id. Because Creative’s proposed design placed a fixed edge along the aft and outboard edges of Deck A, the telescoping sliders could not extend fully to the outboard edges of the platform, as required by the solicitation. Thus, we have no basis to object to the agency’s evaluative findings that the protester’s offered product failed to satisfy the solicitation requirement.

Unequal Evaluation

Creative also asserts that the agency evaluated its and FlexDecks’ proposals unequally. The protester alleges that the agency impermissibly waived the solicitation requirement that the telescoping sliders should replace the aft and outboard edges of Deck A when the agency accepted FlexDecks brand name product which offered a different design. That is, the brand name product also included telescoping sliders placed along the aft and outboard edges of Deck A. Protester’s Comments at 32-35.

These allegations are untimely challenges to the terms of the solicitation. The purpose of a solicitation’s statement of salient characteristics, as set forth in FAR § 11.104(b), is to define the minimum characteristics of the brand name product that an alternative equal product must meet. Thus, by definition, the salient characteristics should be derived from, and should reflect, the essential characteristics of the brand name product. Accordingly, a contention that the solicitation-identified brand name product does not meet the salient characteristics is an argument that the solicitation is defective, because the solicitation represents that the brand name product possesses the salient characteristics, when in the protester’s view, it does not. Capture, LLC, B-409792, June 16, 2014, 2014 CPD ¶ 180 at 6. Any alleged inconsistency between the brand name product and the salient characteristics used to define an “or equal” product must be protested prior to the closing time for receipt of proposals, consistent with our

regulations for challenging solicitation improprieties. See Bid Protest Regulations, 4 C.F.R. § 21.1(a)(1); CAMSS Shelters, supra at 6-7. Accordingly, the above allegations are dismissed.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong
General Counsel